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Nos. ~~711~~ and ~~726~~

In the Supreme Court of the United States

OCTOBER TERM, 1943

JAMES KARL MUSCHANY AND VERA MUSCHANY,
PETITIONERS

v.

UNITED STATES OF AMERICA

WILLIAM L. ANDREWS AND BERTHA L. ANDREWS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Discussion	8

CITATIONS

Cases:

Cont'l Wall Paper Co. v. *Voight & Sons Co.*, 212 U. S. 227	10
Coppell v. *Hall*, 7 Wall. 542	10
Embrey v. *Jemison*, 131 U. S. 336	10
Lebold v. *Inland Steel Co.*, 136 F. 2d 876	11
McMullen v. *Hoffman*, 174 U. S. 639	10
Meguire v. *Corwine*, 101 U. S. 108	10
Newman v. *Moyers*, 253 U. S. 182	10
Oscanyan v. *Arms Co.*, 103 U. S. 261	10
Pullman's Car Co. v. *Transportation Co.*, 171 U. S. 138	10
United States v. *Grace Evangelical Church*, 132 F. 2d 460	10
United States v. *94.68 Acres of Land, St. Chas. Co., Mo.*, 45 F. Supp. 1016	7
Weil v. *Neary*, 278 U. S. 160	10

Statutes:

Act of July 2, 1917, 40 Stat. 241, 50 U. S. C. sec. 171	9
Act of June 28, 1940, 54 Stat. 676, sec. 2 (a)	3
Act of July 2, 1940, 54 Stat. 712	2, 3, 8, 9
Act of September 9, 1940, 54 Stat. 872 (Military Appropriation)	3
Act of May 2, 1941, 55 Stat. 148, sec. 2 (c)	3
Act of June 30, 1941, 55 Stat. 366, sec. 9	3
Act of December 18, 1941, 55 Stat. 838, Tit. II, sec. 201	3
Act of June 5, 1942, 56 Stat. 314, sec. 13, 50 U. S. C. appendix, Supp. II, sec. 773	3

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 711

JAMES KARL MUSCHANY AND VERA MUSCHANY, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 726

WILLIAM L. ANDREWS AND BERTHA L. ANDREWS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

In No. 711 the district court wrote a memorandum opinion (R. 449–460) which is reported in 46 F. Supp. 921. In No. 726 the district court wrote a memorandum opinion (R. 656–657) which is unreported. The opinion of the circuit court of appeals (R. 690–703) is reported in 139 F. 2d 661.

JURISDICTION

The judgments of the circuit court of appeals sought to be reviewed were entered December 22, 1943 (R. 703–704). Petitions for rehearing were denied January 14, 1944 (R. 723, 739). The petitions for writs of certiorari were filed February 17, 1944, and February 24, 1944, respectively. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the option contracts involved contravene the Act of July 2, 1940, 54 Stat. 712, prohibiting the use of the cost-plus-a-percentage-of-cost system of contracting.

STATUTE INVOLVED

The Act of July 2, 1940, 54 Stat. 712, provides in part:

> That (a) in order to expedite the building up of the national defense, the Secretary of War is authorized, out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941, with or without advertising, (1) to provide for the necessary construction, rehabilitation, conversion, and installation at military posts, depots, stations, or other localities, of plants, building, facilities, utilities, and appurtenances thereto (including Government-owned facilities at privately owned plants and the expansion of such plants,

and the acquisition of such land, and the purchase and lease of such structures, as may be necessary) for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies, and for shelter * * * *Provided further,* That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War.[1]

STATEMENT

The Act of July 2, 1940, *supra,* provided for the more expeditious acquisition of property "out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941." The Military Appropriation Act of September 9, 1940, 54 Stat. 872, made additional appropriations of money for the fiscal year 1941 for national defense purposes.

On October 17, 1940, in a letter to the Secretary of War, the President, under the Act of

[1] The proviso of this section has been continued in effect and made applicable to moneys appropriated for the War Department for war purposes. Act of June 30, 1941, sec. 9, 55 State. 366, and Act of June 5, 1942, sec. 13, 56 Stat. 314, 50 U. S. C. appendix, Supp. II, sec. 773. The settled policy of Congress to outlaw cost-plus-a-percentage contracts is also shown by other statutes in which similar provisos appear. Act of June 28, 1940, sec. 2 (a), 54 Stat. 676; Act of May 2, 1941, sec. 2 (c), 55 Stat. 148; Act of December 18, 1941, Title II, sec. 201, 55 Stat. 838.

September 9, 1940, 54 Stat. 872, approved the construction of a TNT and DNT plant at Weldon Springs, Missouri (R. 51, 309). The Secretary of War directed the Quartermaster General of the Army to acquire a site for the plant in St. Charles County, Missouri (R. 52–53). At the direction of the Quartermaster General, Colonel R. D. Valliant, Quartermaster's Corps, in charge of the Real Estate Branch of the War Department, undertook the work of acquiring the land (R. 277).

On or about October 23, 1940, R. Newton McDowell of Kansas City, Missouri, called on Colonel Valliant in Washington, D. C., with reference to the War Department's program to acquire land for the Weldon Springs project through purchase (R. 277). McDowell had previously learned of this program in some manner and had already ascertained that the Kansas City Title and Insurance Company was willing to perform the title work if called upon to do so (R. 88). After conferring with Valliant, McDowell submitted a proposal in the form of a letter dated October 23, 1940, that he, McDowell, be appointed "Optioner" for the Government; that he undertake to acquire options to purchase approximately 18,000 acres of land for the Weldon Springs project within 45 days or such extended period as the United States might require; that he diligently endeavor to obtain the land at the reasonable value thereof; that he obtain the title services of the Kansas City Title and In-

surance Company at his own expense; and that for his services his sole compensation consist "of the five per cent (5%) commission in each purchase, to be paid by the vendor" (R. 231–233). The letter referred to a form of option to be used, under which the vendor would specify the price for which he would sell the land; agree to pay McDowell the 5% commission; agree to grant the Government the right of immediate use and occupancy of the land upon acceptance of the option; and agree to furnish the necessary title papers conveying the land to the United States "free and clear of all taxes, liens and encumbrances of every kind and character, including stamps, taxes and etc." and a certificate of title of the Kansas City Title and Insurance Company (R. 343). McDowell's proposal was accepted by Colonel Valliant acting on behalf of the United States (R. 233).

Within a few weeks McDowell obtained 270 options which he submitted to Colonel Valliant for approval and which were approved by Colonel Valliant on behalf of the United States (R. 280; 693–694). Under the provisions of these option contracts the United States entered into possession of the land early in December of 1940 (R. 98–99, 468, 665). After many of the option contracts had been closed and conveyances made, the United States, having concluded an investigation of the prices which it was paying for land in the Weldon Springs area, determined to repudiate the remaining option contracts on which

no payments had been made and to resort to condemnation (R. 82, 255, 310–313, 694).

In No. 711, a petition in condemnation and a declaration of taking were filed in April of 1941 (R. 4–12). A judgment of condemnation on the declaration of taking was entered April 9, 1941 (R. 13–16). The taking included Tract No. 24/233, consisting of 33.33 acres of land, owned by James Karl Muschany and Vera Muschany. At the time the declaration of taking was filed, $950.00 was deposited as estimated compensation for the land (R. 12–13). On May 17, 1941, the Muschanys filed an answer to the petition in condemnation, in which they alleged that prior to the condemnation proceedings the Government had contracted to purchase the land at a price of $4,500.00, and they prayed that the court dispense with the appointment of commissioners and at once enter judgment fixing an award for the land at the contract price (R. 17–20). On April 3, 1942, the United States filed an amended reply to the answer, in which it alleged that the purchase contract was violative of the provision of the Act of July 2, 1940, prohibiting cost-plus-a-percentage-of-cost contracts (R. 21–36).

Substantially the same proceedings were had in No. 726. A declaration of taking and a petition in condemnation were filed April 15, 1941 (R. 479–488). Judgment on the declaration of taking was entered the same day (R. 488–490). The taking included Tract No. 19, containing

94.46 acres of land, which was owned by William M. Andrews and Bertha Andrews. $3,460.00 was deposited as estimated compensation for the land (R. 487). An answer was filed in which as in No. 711 a contract for the purchase of the land was alleged and a judgment sought fixing an award for the land at the contract price, which was $12,000.00 (R. 498–505). In an amended reply to this answer, the United States interposed the same defense as in No. 711 (R. 506–522).

The two cases were tried before Judges Davis and Moore, respectively. The cases were joined, together with another similar case which was being tried before Judge Collet, for trial before the three judges on the issues pertaining to the validity of the purchase contracts (R. 42–336). Each case was tried separately on the issue as to the value of the land (R. 336–448, 543–655). In the case before him Judge Collet held the contract to be invalid as violative of the prohibition against cost-plus-a-percentage-of-cost contracts contained in the Act of July 2, 1940. *United States* v. *94.68 Acres of Land, St. Chas. Co., Mo.*, 45 F. Supp. 1016 (E. D. Mo. 1942). In the two cases here involved the court made findings and conclusions favorable to the condemnees, Judge Moore adopting, so far as applicable, those made by Judge Davis (R. 449–460, 656–657). The Government filed motions for new trials, which were denied (R. 460–466, 657–665). On October 12,

1942, judgment was entered in No. 711 sustaining the validity of the contract, dispensing with the appointment of commissioners, and making an award of $4,500.00 and interest (R. 466–468). A similar judgment was entered in No. 726 on November 5, 1942, the award being fixed at $12,000.00 and interest (R. 663–665). The circuit court of appeals reversed the two judgments, holding the option contracts invalid under the cost-plus-a-percentage-of-cost proviso of the Act of July 2, 1940 (R. 691–704).

DISCUSSION

1. The Act of July 2, 1940, *supra,* pp. 2–3, authorized the Secretary of War, out of the moneys appropriated for national-defense purposes for the fiscal year ending June 30, 1941, to provide facilities and purchase land for the manufacture, etc. of military equipment, munitions, etc. The Act permitted the use of the cost-plus-a-fixed fee method of contracting, but prohibited the use of the cost-plus-a-percentage-of-cost system. The contracts in question provided for the payment by the United States of a "gross sales price," out of which the Government's purchasing agent was to be paid a five per cent commission (R. 233, 343, 493). Therefore, those contracts manifestly contemplated use of the cost-plus-a-percentage-of-cost system of contracting. Furthermore, since, as the court below held (R. 699–700), the record shows that the gross sales prices specified therein

did include five per cent allowances for the Government's purchasing agent, that system of contracting actually was used in these cases. The purpose of Congress in enacting the proviso of the 1940 Act was to proscribe the percentage method of contracting because of its inherent tendency to increase costs to the Government. The record here (see particularly pp. 696–698) amply demonstrated that such was the probable tendency of the contracts here involved. Accordingly, those contracts fell within the ban of the 1940 Act against cost-plus-a-percentage-of-cost contracts.

2. Petitioners also rely (Muschany Pet. 11, 19, 20–21, 31–35; Andrews Pet. 10–11, 12, 14, 21, 25–29) upon the Secretary of War's broad powers under the Act of July 2, 1917, 40 Stat. 241, 50 U. S. C. sec. 171, to pay a price he deems reasonable for land. In view, however, of the proviso of the 1940 Act, the Secretary had no power whatever to buy and pay for land for munition plants out of moneys appropriated for national-defense purposes for the fiscal year ending June 30, 1941, under the cost-plus-a-percentage-of-cost system of contracting. Petitioners also contend (Muschany Pet. 11, 18, 25–27; Andrews Pet. 27) that the prohibition of the 1940 Act against percentage contracts applies only in the case of construction and supply contracts. However, the statute authorizes both construction and supply contracts and land-purchase contracts, and the prohibition

is by its terms applicable to both. Nor is it material, as petitioners contend (Muschany Pet. 25, 31–33; Andrews Pet. 34), that the prices were fair, for "What is struck at in the refusal to enforce contracts of this kind is not only actual evil results but their tendency to evil in other cases." *Weil* v. *Neary*, 278 U. S. 160, 173. Likewise without merit is the contention based on the claim that an official of the United States had full knowledge from the beginning or ratified the contracts after full disclosure of the method of contracting used (Muschany Pet. 14, 18–19, 27–30; Andrews Pet. 11, 22–24, 36). It would be nonetheless true that the contracts were invalid, for "The defence is allowed, not for the sake of the defendant, but of the law itself." *Coppell* v. *Hall*, 7 Wall. 542, 558; *Meguire* v. *Corwine*, 101 U. S. 108, 111; *Oscanyan* v. *Arms Co.*, 103 U. S. 261, 268–269; *Embrey* v. *Jemison*, 131 U. S. 336, 349; *Pullman's Car Co.* v. *Transportation Co.*, 171 U. S. 138, 151; *McMullen* v. *Hoffman*, 174 U. S. 639, 655, 658; *Cont'l Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227, 261–264; *Newman* v. *Moyers*, 253 U. S. 182, 185.

3. *United States* v. *Grace Evangelical Church*, 132 F. 2d 460 (C. C. A. 7), is, as petitioners contend, in conflict with the decision below. However, further proceedings were had in that case in the trial court pursuant to the opinion of the circuit court of appeals, and the United States is prosecuting a second appeal, on which, relying on the inter-

vening decisions of the Eighth Circuit Court of Appeals herein, it will seek reversal of the holding that the option contract there involved was not illegal under the Act of July 2, 1940. Cf. *Lebold* v. *Inland Steel Co.*, 136 F. 2d 876 (C. C. A. 7). The second appeal has been set for oral argument on April 6, 1944. In view of the conflicting decisions of the Seventh and Eighth Circuit Courts of Appeals, the Government does not at this time oppose the granting of the petitions herein but suggests that decision thereon should be postponed pending the outcome of the second appeal in the *Grace Church* case. The problem these cases present is not widespread because, we are informed, this type of contract was not entered ~~infor~~ into for purchase of land in states outside the Sixth, Seventh, and Eighth Circuits (see R. 279, 311–312). Therefore unless the present conflict should persist there would seem to be no reason for review by this Court.

Respectfully submitted,

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